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No. _____

In The

Supreme Court of the United States

MAX E. ANDERSON, d.b.a. M.X. EXPRESS,

Petitioner,

v.

INDIANA DEPARTMENT OF STATE REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Tax Court Of Indiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court imposes a more rigorous standard under the Commerce Clause for user fees than for general revenue measures. Indiana collects a motor fuel use tax on trucks using its highways. The tax is calculated precisely to reflect the extent of highway use. Should Indiana be permitted to avoid the more rigorous standard by classifying this tax as a general revenue measure rather than a user fee?

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OPINIONS BELOW

The opinion of the Tax Court of Indiana (App., *infra*, 1-11) is reported at 758 N.E.2d 597. The Order of the Tax Court denying petitioner's motion for rehearing (App., *infra*, 12) is not reported). The order of the Supreme Court of Indiana denying petitioner's leave to appeal (App., *infra*, 14) is not reported.

JURISDICTION

The order of the Supreme Court of Indiana denying petitioner's leave to appeal was entered on May 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the U.S. Constitution, U.S. Const. Art. I, § 8, cl. 3, provides: "The Congress shall have the Power * * * To regulate Commerce with foreign Nations, and among the several States, and the Indian Tribes."

The relevant provisions of the Indiana Motor Carrier Fuel Tax, IC 6-6-4.1, are set out in the appendix to this petition at App. 15-20.

STATEMENT

This case presents a question of considerable importance regarding the proper application of the Commerce Clause: how to determine whether a state levy on participants in interstate commerce is a user fee or a general revenue tax. The question has great practical significance. Under this Court's precedents, a user fee will be upheld only if there is "a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered [to the taxpayer].'"[1] General revenue taxes, by contrast, are subject to a much more forgiving standard. States may defend general revenue levies by showing little more than that the amount of tax imposed varies in proportion to the level of the taxpayer's in-state activities; taxing authorities need not demonstrate that the tax collected actually approximates the cost or value of the services provided to the taxpayer by the State.[2]

The Indiana Motor Carrier Fuel Tax is a user fee because it is imposed only on selected individuals in amounts that reflect the extent of their use of Indiana's highways. It "correlate[s] reliably with the * * * services used or usable by the [payer]" and "fairly match[es] the [payer's] use of [government] services and facilities."[3]

The Indiana Tax Court created a patently erroneous test to find that its Motor Carrier Fuel Tax was a general

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[1] *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 622 n.12 (1981) (citation omitted).

[2] See, *e.g.*, *id.* at 622-623.

[3] *United States* v. *U.S. Shoe Corp.*, 523 U.S. 360, 369-370 (1998).

revenue measure and thus capable of passing muster under the lenient standards applicable to such levies. In doing so, it joined the lower courts of Illinois, New York and Ohio, which have adopted similarly flawed analyses to sidestep this Court's more stringent requirements for upholding user fees under the Commerce Clause.[4] These courts have found dispositive the *labels* attached to the levies, while wholly disregarding the *actual character* of the fees. This embrace of formalism and rejection of economic reality cannot be squared with this Court's precedents. Moreover, there has been no substantial review of these decisions and the important principles of federalism at stake. The highest courts in New York, Illinois and Indiana declined to review their lower courts' decisions on this issue. Absent consideration by this Court, the Indiana Tax Court ruling and similar decisions will frustrate significant Commerce Clause policies, blur the boundaries in an important area of federal-state relations, and encourage evasion of Commerce Clause requirements. As recognized throughout the history of Commerce Clause jurisprudence, the incentives for singling out non-voting transients as a source of state revenues pose substantial dangers to federalist principles. Review of the Indiana decision is critical in order to reestablish the boundaries of a state's authority to tax interstate commerce.

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[4] See *Owner-Operator Independent Drivers Ass'n* v. *Bower*, 757 N.E.2d 627 (Ill. App. Ct. 2001); *Owner-Operator Independent Drivers Ass'n* v. *Urbach*, 718 N.Y.S.2d 282 (N.Y. App. Div. 2000), *cert. denied*, 122 S. Ct. 1305 (2002); *Owner-Operator Independent Drivers Ass'n* v. *Tracy*, No. 99CVH02-1412, slip op. 11 (Ohio C.P. Franklin County, June 7, 2001) (Magistrate's decision on appeal to trial court).

A. All Costs of the Indiana Toll Road Are Paid for by Tolls And Revenues Other than the Motor Carrier Fuel Tax at Issue

The State of Indiana imposes a toll on motor carriers that travel on the Indiana Toll Road. These tolls, along with related revenue from concessionaires, pay for all services provided by Indiana to commercial vehicles operating on the Toll Road. On the current state of the record, it must be accepted, as alleged in the complaint, that "[t]he entire cost of operating the Toll Road, including all administrative, maintenance and capital costs, as well as the cost of traffic control, safety, and policing functions, are paid for through tolls, restaurant and service station concessions, and similar earnings." See App., *infra,* 29 ¶ 20.

B. Indiana's Motor Carrier Fuel Tax Is an Additional Levy Imposed Only on Commercial Motor Carriers Based on Their Use of the Indiana Toll Road and Other Indiana Highways

Notwithstanding that all costs of the Toll Road are paid for by other revenues, Indiana imposes an additional levy, the Motor Carrier Fuel Tax ("MCFT"), on commercial motor carriers traversing all Indiana highways, including the Toll Road. The MCFT is collected only on fuel consumed for highway use and is calibrated to reflect the extent of that use. Indiana Code section 6-6-4.1-4 imposes a tax of 16 cents per gallon "on the consumption of motor fuel by a carrier in its operations on highways in Indiana."[5]

[5] Motor carriers who consume fuel in Indiana for non-highway purposes may claim a credit for those uses. IC 6-6-4.1-4.8.

This tax is collected when the motor carrier purchases fuel at a filling station. Indiana also collects an additional surcharge of 11 cents per gallon on motor carriers for the same use of its highways, which is collected when the motor carrier files its quarterly fuel tax return.[6] The motor vehicles subject to these levies are commercial vehicles that have more than three axles or exceed 26,000 pounds.[7]

The MCFT is collected only on fuel consumed by these trucks while driving on Indiana highways. Motor carriers that purchase fuel in Indiana are entitled to a credit or refund for the tax paid on such fuel at the pump when the fuel is consumed outside the State.[8] Conversely, carriers that purchase fuel outside Indiana but use it in the State are required to pay the MCFT on the portion of that fuel used in Indiana.[9] Revenues collected under these provisions are placed in the "state highway fund" or "motor vehicle highway account."[10] In total, the tax collected under the MCFT equals 27 cents per gallon of fuel consumed, or approximately five cents per mile, for a large commercial vehicle. See App., *infra,* 29 ¶ 22.

C. The Decision Below

Petitioner brought this action in the Indiana Tax Court to challenge the constitutionality of the MCFT as

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[6] IC 6-6-4.1-4.5.

[7] IC 6-6-4.1-2.

[8] IC 6-6-4.1-6.

[9] IC 6-6-4.1-4.4, IC 6-6-4.1-4.5.

[10] IC 6-6-4.1-5.

the levy applies to travel on the Indiana Toll Road. Petitioner maintains that the MCFT is a "user fee" because it is imposed only on selected individuals (operators of large commercial vehicles using the highways of Indiana) and in amounts precisely calibrated to reflect that use. Such a fee is invalid under the Commerce Clause unless record evidence supports the conclusion that the amount collected reasonably approximates the cost or value of the services provided by the taxing State to the fee payer. Since the *entire* cost of Toll Road services is already covered by tolls, the additional imposition of the MCFT on Toll Road miles is necessarily excessive and an undue burden on interstate commerce. Petitioner does not contest the constitutionality of the MCFT as it is applied to travel on other Indiana roads.

The Indiana Tax Court conceded the importance of the distinction between user fees and general revenue measures under the Commerce Clause. See App., *infra*, 7-8 n.3. However, using tortured logic, it concluded that the MCFT was not a user fee. *Id.* Then applying the standards for general revenue measures, the court dismissed the case. App., *infra*, 8-10. The Indiana Supreme Court denied petitioners leave to appeal. App., *infra*, 14.

REASONS FOR GRANTING THE PETITION

The holding below, like the decisions in Illinois, New York and Ohio, greatly expands state power to impose burdensome taxes and fees on instrumentalities of interstate commerce and threatens to cause considerable

mischief and confusion in an area of law that this Court has itself described as a "'quagmire.'"[11] This Court has drawn a sharp distinction between the treatment accorded general revenue taxes under the Commerce Clause, on the one hand, and user fees, on the other. But the court below subverted that rule by holding that the MCFT should *not* be treated as a user fee for Commerce Clause purposes – even though the MCFT is a user fee under all established tests. It is imposed on a narrow category of payers who become liable for the fee by engaging in activities that make use of state facilities, and the amount of the fee reflects the extent to which the payers use those facilities. This decision is one of many where state courts and taxing authorities have evaded Commerce Clause restrictions on the imposition of targeted fees and taxes for the use of interstate commerce facilities. Because this holding involves recurring issues of great practical importance, imposes significant burdens on interstate commerce, oversteps an important line in federal-state relations, and plainly departs from this Court's precedents, further review is warranted.

A. The Issue Presented Here Is An Important And Recurring One

The issue presented here is a recurring one of enormous practical and precedential importance that warrants this Court's attention. Motor fuel taxes like the MCFT are imposed by all but one of the States. These levies have

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[11] *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 280 (1987) (citation omitted).

generated considerable litigation. At the time the present suit was initiated against the State of Indiana, three substantially identical cases were pending against state taxing authorities in Illinois, New York, and Ohio. Courts in each of these jurisdictions, following New York's lead, held that their fuel use taxes are not user fees.[12] Absent intervention by this Court, the momentum generated by these decisions – and the reluctance of state courts to recognize constitutional limits on state taxing authority – will likely result in no substantial review of the validity of such taxes and the important issues of federalism implicated by this end run around the Commerce Clause.

The economic burdens involved are substantial. Levies like the MCFT are used to raise significant amounts of revenue – and impose correspondingly large burdens on interstate motor carriers. User fees in excess of $18 million annually are at stake in this case alone. Nationwide, it is likely that taxes imposed by States on the use of motor fuel by commercial vehicles on toll roads amount to hundreds of millions of additional dollars. These amounts are large in absolute terms. And they have special importance for small truckers like the petitioner here, who pay a substantial portion of their gross revenues in motor fuel fees. Owner-operators under lease to motor carriers typically are responsible for paying the cost of operating their equipment, including the cost of fuel and

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[12] See *Owner-Operator Independent Drivers Ass'n* v. *Bower*, 757 N.E.2d at 633-634; App., *infra*, 7-8 n.3 (citing to the Illinois Appellate Court decision, which in turn relied on the New York decision); *Owner-Operator Independent Drivers Ass'n* v. *Tracy*, No. 99CVH02-1412, slip op. 11.

fuel use taxes. The burden of paying such taxes falls particularly hard on owner-operators, whose annual incomes are often in the range of $35,000-$40,000. At the same time, owner-operators comprise one of the primary sectors of the interstate motor carrier industry, accounting for an estimated 40 percent of intercity truck traffic in the United States; nationwide, there are hundreds of thousands of owner-operators. In this setting, the failure of the Court to grant review will result in the continuation of the collection of these unconstitutional taxes and fees by the States with no recourse by those on whom they are assessed.

Review is especially warranted because the issue presented here has implications that go far beyond fees imposed on the use of motor fuel. The question whether a levy is a user fee may arise in a wide range of Commerce Clause contexts and may have relevance in other constitutional settings as well.[13] Yet the approach taken by the decision below disregards the relevant holdings of this Court and threatens to wholly sap the Commerce Clause user fee doctrine of its vitality, offering state legislatures a rhetorical formula that always can be used to circumvent the constitutional rule. If the close scrutiny long required of user fees is to be cast aside, that step should be taken only after careful consideration of the issue by this Court.

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[13] Cf. *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-61 (1989) (treating a fee required to be paid to the United States for arbitration services from awards of the Iran-United States Claims Tribunal as a permissible user fee rather than an unconstitutional taking).

B. The MCFT Cannot Satisfy This Court's Commerce Clause Test For User Fees

This case involves application of the fourth prong of the Commerce Clause test articulated in *Complete Auto Transit*,[14] which provides that a "state tax on interstate commerce" will be invalidated unless the tax "is fairly related to the services provided [to the taxpayer] by the State."[15] It is common ground between the parties here that, where *general revenue taxes* are concerned, this "fair relationship" requirement is satisfied so long as "the measure of the tax [is] reasonably related to the extent of the [taxpayer's] contact" with the taxing State.[16]

The Court, however, has applied a very different Commerce Clause test to *user fees*. As the Court explained in *Commonwealth Edison*:

> "Such imposition[s], although termed a tax, *cannot be tested by the standards which generally determine the validity of taxes*." *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 190 (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing

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[14] *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

[15] *Id.* at 279. In addition to this requirement, a state tax is inconsistent with Commerce Clause requirements unless it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [and] [3] does not discriminate against interstate commerce." *Complete Auto Transit*, 430 U.S. at 279. See also, *e.g.*, *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 310-313 (1992). The application of these prongs of the *Complete Auto* test is not at issue here.

[16] *Commonwealth Edison Co.*, 453 U.S. at 626 (emphasis omitted); see also *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 199 (1995).

> specific quantifiable services, *we have required a showing, based on factual evidence in the record, that "the fees charged do not appear to be manifestly disproportionate to the services rendered. . . . " Clark* v. *Paul Gray, Inc.*, 306 U.S. [583], 599 [(1939)]. See *id.*, at 598-600; *Ingels* v. *Morf*, 300 U.S. [290], 296-297 [(1937)].
>
> One commentator has suggested that these "user" charges "are not true revenue measures and . . . the considerations applicable to ordinary tax measures do not apply." P. Hartman, *State Taxation of Interstate Commerce* 20, n.72 (1953). Instead, "user" fees "partak[e] . . . of the nature of a rent charged by the State, based upon its proprietary interest in its public property, [rather] than of a tax, as that term is thought of in a technical sense." *Id.* at 122.[17]

This remains the law; the current version of Prof. Hartman's treatise makes the same point in almost precisely the same language.[18] Prof. Walter Hellerstein, perhaps the nation's leading scholar of state and local taxation, recently made an identical argument in an *amicus* brief filed in this Court.[19]

When applying the user-fee test under the appropriate circumstances, the Court has repeatedly invalidated state fees where the record supported the conclusion that the

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[17] 453 U.S. at 622 n.12 (ellipses and bracketed material added by the Court; emphasis added).

[18] See P. Hartman, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 670 (1981 & Supp. 1999).

[19] No. 98-1282, *Franks & Son, Inc.* v. *Washington*, Br. of *amicus* American Trucking Ass'n, Inc. in support of petitioner, at 9 n.5 (emphasis in original).

amounts collected substantially exceeded the cost of services provided to the payers.[20] Conversely, the Court has upheld such fees only after examining the record and determining that the fees were not "excessive in relation to costs incurred by the taxing authorities."[21]

Plainly, the MCFT cannot satisfy this Commerce Clause user fee test, and the court below did not suggest that it could. It is undisputed that there is *no* factual evidence in the record indicating that, so far as the MCFT is concerned, there is *any* relationship between the amount of tax paid and the services provided to the payers, or *any* evidence from which it could be concluded that the MCFT "purport[s] to approximate fairly the cost or value of the use of [the Indiana Toll Road]."[22] To the contrary, on the current state of the record, it must be accepted that "[t]he *entire* cost of operating the Indiana Toll Road, including all administrative, maintenance and capital costs, *as well as the cost of traffic control, safety, and all policing functions*, are paid for through tolls, restaurant and service station concessions, and similar earnings." App., *infra*, 29 ¶ 20 (emphasis added). If the entire cost of the Toll Road is covered by tolls and miscellaneous revenue, the imposition of a fuel use tax on top of the tolls is necessarily excessive and an undue burden on commerce.

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[20] See, *e.g.*, *Ingels*, 300 U.S. at 296-297; *Interstate Transit*, 283 U.S. at 190; *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 180 (1940).

[21] *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines*, 405 U.S. 707, 719-720 (1972). See *Clark*, 306 U.S. at 599.

[22] *American Trucking Ass'ns*, 483 U.S. at 290.

C. The MCFT Must Be Treated As A User Fee For Commerce Clause Purposes

Against this background, the dispositive question in this case is whether the MCFT must be characterized for Commerce Clause purposes as a user fee rather than a general revenue tax.[23]

The MCFT plainly is a user fee that constitutes "a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services."[24] The MCFT is imposed on a small group of payers – commercial motor carriers, who are almost invariably engaged in interstate commerce. Tax liability is incurred only because the payers conduct particular activities involving use of state facilities. The amount due, moreover, varies directly with the *extent* of the use of state facilities; the more miles driven on Indiana roads, the more the carrier will pay in fees. Indeed, motor carriers receive a refund for taxes paid on fuel that is purchased but not consumed in Indiana.

Contrary to the Tax Court's assertions, the MCFT is the archetype of a user fee. Other levies treated by this Court as user fees have shared the same essential characteristics: they were imposed exclusively on a limited group

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[23] The appropriate characterization of a state levy for purposes of the U.S. Constitution is, of course, a matter of federal law. See, *e.g.*, *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 609 (1975) (in addressing where legal incidence of a state tax falls when determining entitlement to constitutional tax immunity, "the duty rests on this Court to decide for itself").

[24] *Commonwealth Edison*, 453 U.S. at 621.

of participants in interstate commerce by virtue of the payers' use of state roads or other facilities.[25]

Viewing the MCFT as a user fee for Commerce Clause purposes also draws support from decisions involving closely analogous constitutional and statutory provisions. In *U.S. Shoe,* for example, the Court held that the principal characteristic distinguishing a "user fee" from a "tax" under the Export Clause is that user fees "correlate reliably with the * * * services used or usable by the [payer]" and "fairly match the [payer's] use of [government] services and facilities."[26] That is true of the MCFT, the amount of which is precisely calibrated to reflect the payer's use of Indiana roads. Conversely, as then-Judge Breyer wrote in explaining how "to distinguish 'taxes' from regulatory 'fees' in a variety of statutory contexts," "[t]he classic 'tax' is imposed by a legislature upon many, or all, citizens."[27] That is *not* true of the MCFT, which is targeted to fall only upon motor carriers that operate large trucks on Indiana highways. And like many user fees, revenues from the MCFT are placed in a segregated fund and dedicated in significant part to specified uses that are

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[25] See, *e.g.*, *Evansville-Vanderburgh Airport Authority Dist.*, 405 U.S. at 709-710 (fee on enplaning air passengers); *Clark*, 306 U.S. at 586-587 (fee on vehicles driven into State for purposes of sale); *Ingels*, 300 U.S. at 292 (fee for transporting vehicles into State for purposes of sale); *Interstate Transit*, 283 U.S. at 185 (fee on busses graduated according to seating capacity).

[26] *U.S. Shoe Corp.*, 523 U.S. 369-370.

[27] *San Juan Cellular Tel. Co.* v. *Public Service Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992).

related to the activities giving rise to fee liability.[25] The analysis used below is in considerable tension with these decisions.

The Tax Court dismissed the notion that the MCFT is a user fee by injecting a factual assumption, nowhere supported in the record, that one who pays the MCFT "enjoys the same benefits as do all citizens alike – the use of the Indiana highways." App., *infra*, 7-8 n.3. The Tax Court then concluded that, since motor carriers who pay the MCFT take nothing special in exchange for their payment, the MCFT is a tax, not a user fee. The Tax Court's position is factually and legally flawed and departs from important precedent of this Court.

First, prior to the Tax Court's October 30, 2001 opinion, neither side questioned the premise that operating 80,000-pound vehicles on Indiana's highways was a special privilege for which the MCFT was imposed for payment. The Tax Court, *sua sponte*, assumed facts not in evidence, to conclude that the Petitioner enjoyed only such benefits as were extended to all citizens alike – the use of Indiana's highways. In its motion for rehearing, Petitioner presented the Tax Court with evidence demonstrating – contrary to the court's unfounded assumption – that a motor carrier's use of an 80,000-pound vehicle (with cargo) on the state's highways is a special privilege, which imposes additional burdens on the State's roads and for which additional payment could be charged. Defendant

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[25] See, *e.g.*, *Massachusetts* v. *United States*, 435 U.S. 444 (1978) (intergovernmental tax immunity doctrine); *Edye* v. *Robertson* (*Head Money Cases*), 112 U.S. 580, 595-596 (1884) (Uniformity Clause); *San Juan Cellular*, 967 F.2d at 685-687.

filed no opposition to Petitioner's Motion for Rehearing so it is uncontested that motor carriers enjoy a special privilege not enjoyed by others. The typical 80,000-pound, five-axle tractor-trailer combination causes significantly more wear and tear on Indiana's highway system than an automobile or light truck. Heavily loaded motor vehicles require that existing pavements be given more frequent resurfacing and/or increases in the overlay thickness of the resurfacing.[29] The reason for these additional costs is that the wear and tear on highways "increase sharply with vehicle weight."[30] The factual assumption injected by the Tax Court in its opinion, that motor carriers operating 80,000-pound vehicles take no more benefit from the State than others driving sedans, has no support in the record. The Tax Court's premise that Petitioner enjoys only the same benefits as other users of the highways is simply wrong.

Second, the court then reasoned that a tax is compulsory while a user fee "is an optional, specific charge 'for the use of publicly-owned or publicly-provided facilities or services'" App., *infra*, 7-8 n.3 (*quoting City of Gary v. Indiana Bell Tel.*, 732 N.E.2d 149, 156 (Ind. 2000)). Since, in the court's view, payment of the MCFT is *compulsory* on those who consume fuel, it reasoned that the levy is a tax, not a user fee. The court's obvious error was in failing to recognize that all user fees are "compulsory" in the sense that all who chose to use state-provided facilities must pay. But user fees are voluntary because they are imposed

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[29] See Transportation Research Board, National Research Council, *Truck Weight Limits: Issues and Options* 72-73 (1990).

[30] *Id.* at 80.

only on fee payers that elect to use the state-provided facilities. Not everyone chooses to drive an 80,000-pound truck (with cargo) down the highways of Indiana, but only those who make this choice pay the fee.

The MCFT is a voluntary payment made only by those who elect to use motor fuel to propel vehicles on the Indiana highways. The implementing statute states: "A tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana."[31] The tax on fuel use is not imposed if that fuel is not used to propel trucks on the Indiana highways.[32] If a motor carrier purchases motor fuel in Indiana but consumes the fuel on the roads of another state, the carrier will receive a refund on the Indiana taxes paid on that fuel.[33] Nor is the tax paid on the use of fuel used to power auxiliary equipment on cement mixers, refrigeration trucks, mobile cranes, and sanitation trucks.[34]

Third, other indicia confirm the common sense view that the MCFT is a user fee. The Federal Highway Administration of the U.S. Department of Transportation commonly treats all levies on motor vehicles and motor fuel as "user" fees and taxes.[35] Courts in other States have

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[31] IC 6-6-4.1-4(a).

[32] IC 6-6-4.1-4(d).

[33] IC 6-6-4.1-6.

[34] See IC 6-6-4.1-4.8, 45 IAC 13-4-7.

[35] See, *e.g.*, U.S. Dept. of Transportation, *1999 Status of the Nation's Highways, Bridges and Transit: Conditions and Performance, Report to Congress*, Chapter 6, at 6-4 (characterizing "Motor-Fuel Taxes" as "User Charges").

agreed that highway taxes are a form of user fee.[36] Even the New York Court of Appeals once described all of the State's highway taxes as "user-derived taxes and fees."[37] These exactions included "*taxes and fees derived from use of [highway] facilities*: vehicle registration fees, *the motor fuel tax*, the petroleum and aviation fuel business tax and miscellaneous highway use taxes."[38] Indeed, prior to the filing of this lawsuit, the same judge of the Indiana Tax Court, on two occasions, had described the MCFT as a user tax.[39] The Indiana Tax Court had a sudden change of heart when faced with having to treat the Indiana fuel use tax as a user fee for Commerce Clause purposes. It was only when faced with a constitutional challenge to their motor fuel taxes that the state courts had similar, convenient changes of heart.

CONCLUSION

This Court's ruling in *Commonwealth Edison* reaffirmed a long line of decisions holding that user fees are subject to a higher level of scrutiny under the Commerce

[36] See, *e.g.*, *In re Oklahoma Capitol Improvement Auth.*, 958 P.2d 759, 764-765 (Okla. 1998) (describing Oklahoma highway taxes).

[37] *Schulz* v. *State*, 639 N.E.2d 1140, 1143 (N.Y. 1994).

[38] *Id.* at 1142 (emphasis added).

[39] See *Area Interstate Trucking, Inc.* v. *Indiana Dept. of Revenue*, 605 N.E.2d 272, 277 (Ind. Tax Ct. 1992), *cert. denied*, 510 U.S. 864 (1993) ("the purpose of the motor carrier fuel tax is simply to charge motor carriers for the use of the public roads in Indiana"); *Roehl Transport, Inc.* v. *Indiana Dept. of Revenue*, 653 N.E.2d 539, 564 (Ind. Tax. Ct. 1995) (applying to Indiana's fuel use tax the rule applicable to user fees set forth in *Evansville-Vanderburgh*).

Clause than general revenue measures. State courts, including those in Indiana, are well aware that they can avoid the more searching review given user fees if they merely classify collections as general revenue measures even though they are imposed on a selected group that use state-provided facilities and even though the amount is calculated to reflect the extent of use. Review of the Indiana decision is warranted in order to reestablish the boundaries of a state's authority to tax interstate commerce. The petition for certiorari should be granted.

Respectfully submitted,

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IN THE
INDIANA TAX COURT

MAX E. ANDERSON, d.b.a. M.X. EXPRESS,
Petitioner,
v.
INDIANA DEPARTMENT OF STATE REVENUE,
Respondent.

Cause No. 49T10-0002-TA-13

ON APPEAL FROM A FINAL DETERMINATION OF THE INDIANA DEPARTMENT OF STATE REVENUE

FOR PUBLICATION
October 30, 2001

FISHER, J.

Max E. Anderson, d.b.a. M.X. Express (M.X. Express), appeals the November, 10, 1999 order of the Indiana

Department of State Revenue (Department) denying M.X. Express's claim for a refund of Indiana's Motor Carrier Fuel Tax (MCFT) for 1997, 1998, and the first two quarters of 1999. This matter is before the Court on M.X. Express's Motion for Class Certification and its Motion for Partial Summary Judgment, in which M.X. Express raises the following issues:

I. Whether the Court should certify a class for which M.X. Express would be the representative; and

II. Whether the assessment and collection of the MCFT for fuel consumed on the Indiana Toll Road (Toll Road) violates the Commerce Clause.

For the reasons stated below, the Court DENIES M.X. Express's Motion for Class Certification and DENIES its Motion for Partial Summary Judgment. The Court GRANTS summary judgment to the Department.

FACTS AND PROCEDURAL HISTORY

The facts of the case are undisputed. M.X. Express is an Indiana-based interstate carrier[1] that was engaged in business within and without Indiana during the period at issue. Beginning January 1997 and ending June 30, 1999, M.X. Express paid the MCFT to the Department pursuant to the International Fuel Tax Agreement (IFTA), which allows carriers to file a consolidated motor fuel use tax return in a "base state." The base state collects all fuel use

[1] A "carrier" is defined as "a person who operates or causes to be operated a commercial motor vehicle on any highway in Indiana." IND.CODE § 6-6-4.1-1(a).

taxes that a carrier owes and distributes the revenue to the other states in which the carrier operates. *See Owner-Operator Indep. Drivers Ass'n v. Dep't of Revenue*, 725 N.E.2d 891, 892 (Ind. Ct. App. 2000), *trans. denied.* The base state of M.X. Express is Indiana.

The MCFT, imposed at a rate of $0.27 per gallon, is calculated pursuant to Indiana Code § 6-6-4.1-4(b), which provides:

> The amount of motor fuel consumed by a carrier in its operations on highways in Indiana is the total amount of motor fuel consumed in its entire operations within and without Indiana, multiplied by a fraction. The numerator of the fraction is the total number of miles traveled on highways in Indiana, and the denominator of the fraction is the total number of miles traveled within and without Indiana.

IND.CODE § 6-6-4.1-4(b). Indiana's Toll Road is considered a "highway" for the purpose of calculating the MCFT. *Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d 272, 275 (Ind. Tax Ct. 1992), *cert. denied; Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 574 N.E.2d 311, 314 (Ind. Ct. App. 1991), *trans. denied.* The Toll Road, however, receives no MCFT revenue. *Area Interstate Trucking*, 605 N.E.2d at 275 n.3. On November 1, 1999, M.X. Express submitted a claim to the Department for an MCFT refund of $1,538.39 paid on the fuel M.X. Express consumed on the Toll Road. In its refund request, M.X. Express opined that the collection of the MCFT for fuel consumed on the Toll Road violated the Commerce Clause, stating that

> [t]he Department of Revenue's collection of the Motor Carrier Fuel Tax on account of miles

> driven by commercial vehicles on the Toll Road is not fairly related to any services provided by the State of Indiana in connection with interstate travel over the Toll Road in that: (a) the State of Indiana itself provides no services in connection with the operation of the Toll Road; and (b) such services provided to commercial vehicles by the [Toll Road] Authority are fully paid through the collection of tolls and other revenues no part of which comes from the State of Indiana.

(Attach. to Pet'r Class Action Original Tax Appeal for Declaratory and Injunctive Relief and Damages.) M.X. Express did not, and does not, challenge the constitutionality of the assessment and collection of the MCFT for the fuel it consumes on any Indiana highways other than the Toll Road. (Pet'r Mem. in Supp. of Mot. for Partial Summ. J. at 2 n.1.)

On November 10, 1999, the Department denied M.X. Express's refund request. M.X. Express commenced an original tax appeal on February 2, 2000, requesting that this Court certify a class of carriers for which M.X. Express would be the representative. On September 14, 2000, M.X. Express filed a Motion for Partial Summary Judgment on the issue of whether the MCFT violates the Commerce Clause. This Court heard oral arguments on December 4, 2000. Additional facts will be supplied when necessary.

ANALYSIS AND OPINION

Standard of Review

This Court reviews findings of the Department de novo and is therefore bound by neither the evidence nor the issues raised at the administrative level. IND.CODE

§ 6-8.1-9-1(d); *Jack Gray Transport, Inc. v. Dep't of State Revenue*, 744 N.E.2d 1071, 1074 (Ind. Tax Ct. 2001), *reh'g granted in part*. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). When any party has moved for summary judgment, the Court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment has been filed by such party. Ind. Trial Rule 56(B); *Encyclopaedia Britannica, Inc. v. State Bd. of Tax Comm'rs*, 663 N.E.2d 1230, 1232 (Ind. Tax Ct. 1996).

Discussion

Class Certification

M.X. Express asks this Court to certify a class for which M.X. Express would be the representative. Under Indiana Trial Rule 23(A), the following criteria must be met for a class to be certified: (1) the potential class members must be so numerous that joinder of all members is impracticable; (2) questions of law or fact must be common to the class; (3) the claims or defenses of the representative party must be typical of the claims or defenses of the class; and (4) the representative party must be able to fairly and adequately protect the interests of the class. *Jack Gray*, 744 N.E.2d at 1074.

In the instant case, the Court questions whether M.X. Express has sufficiently shown that it will fairly and adequately protect the interests of the class. The adequacy of representation is a question of fact to be resolved by this Court, *see Hefty v. All Other Members of the Certified Settlement Class*, 680 N.E.2d 843, 851 (Ind. 1997), and the

named representative has the burden of proof to show that it will fairly and adequately represent the putative class. *Dunn v. Jenkins*, 377 N.E.2d 868, 871 (Ind. 1978). The Court does not doubt the skill and ability of M.X. Express's counsel to litigate this class action. The Court is concerned, however, that counsel has not laid a sufficient foundation of fact showing M.X. Express's willingness and ability to serve as the named representative.[2] Because M.X. Express has not satisfied its burden of proof with regard to this particular matter, the Court DENIES its request for class certification at this time.

MCFT

M.X. Express asserts that the imposition of the MCFT on fuel it consumes on the Toll Road violates the Commerce Clause of the U.S. Constitution, which grants Congress the power "[to] regulate Commerce . . . among the several States. . . . " U.S. Const. Art. I, § 8 cl. 3. Although the clause is silent as to how much economic regulatory power a state retains, it has been applied to prevent states from discriminating against out-of-state economic interests or from benefiting in-state interests.

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[2] Counsel for M.X. Express opines that "[b]y bringing and diligently prosecuting this case to date, the named class representative has more than demonstrated [its] ability and willingness to pursue the interests of the Class through qualified counsel." (Pet'r Mem. in Supp. of Mot. for Class Certification at 33.) No case law is cited for this proposition, and the Court is not persuaded by conclusory statements. *See, e.g., Miller Structures, Inc. v. Indiana State Bd. of Tax Comm'rs*, 748 N.E.2d 943, 954 (Ind. Tax Ct. 2001). If the parties so move, the Court will set a hearing on the issue of M.X. Express's adequacy as the named representative.

General Motors Corp. v. Indianapolis Power & Light Co., 654 N.E.2d 752, 764 (Ind. Ct. App. 1995) (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984)). The U.S. Supreme Court has rejected the view, however, that interstate commerce is immune from state taxation. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977), *reh'g denied*. Consequently, a state tax will withstand a Commerce Clause challenge if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State. *Roehl Transport, Inc. v. Indiana Dep't of State Revenue*, 653 N.E.2d 539, 545 (Ind. Tax Ct. 1995) (citing *Complete Auto*, 430 U.S. at 279).

In this case, M.X. Express specifically argues that the MCFT assessed and collected for fuel consumed on the Toll Road violates the Commerce Clause because the tax is not fairly related to the services provided by the State.[3] The

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[3] M.X. Express' argument is premised on an assumption that the MCFT is not a tax but a user fee charged for using Indiana highways. Because U.S. Supreme Court dictum suggests that a fee charged for "specific quantifiable services" cannot survive a Commerce Clause challenge if it is "manifestly disproportionate to the services rendered," *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 622 n.12 (1981), *reh'g denied*, M.X. Express reasons that the fourth prong of *Complete Auto* should be narrowed by *Commonwealth Edison*.

A tax is compulsory and "entitles the taxpayer to receive nothing in return, other than the rights of government which are enjoyed by all citizens alike." *Ennis v. State Highway Commission*, 108 N.E.2d 687, 693 (Ind. 1952). A user fee, on the other hand, is an optional, specific charge "for the use of publicly-owned or publicly-provided facilities or services" that afford a "particular benefit to the payer." *City of Gary v. Indiana Bell Tel.*, 732 N.E.2d 149, 156 (Ind. 2000) (citation omitted, internal punctuation omitted), *reh'g denied*. Payment of the MCFT is

(Continued on following page)

fourth prong of *Complete Auto* requires that the MCFT only be fairly related to the "multitude of services provided to the citizens by the State." *Hoosier Energy Rural Elec. Coop., Inc. v. Indiana Dep't of State Revenue*, 572 N.E.2d 481, 485 (Ind. 1991), *cert. denied; see also Complete Auto*, 430 U.S. at 287; *Commonwealth Edison*, 453 U.S. at 625. This requirement, however, does not call for a rigorous quantification of the services provided. As the U.S. Supreme Court has said:

> The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity. If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be made to pay its fair share of state expenses

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compulsory, IND.CODE §§ 6-6-4.1-4(a) (imposing the MCFT on fuel consumption); 6-6-4.1-4.5(a) (providing that the MCFT "shall be paid"), and M.X. Express obviously enjoys the same benefit as do all citizens alike – the use of Indiana highways – which means that the benefit is not particular to M.X. Express. *See National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974) (holding that a fee payer enjoys benefits "not shared by other members of society"). Clearly, then, the MCFT is a tax. *See Roehl Transport*, 653 N.E.2d at 546. *Cf. Owner-Operator Independent Drivers Ass'n v. Bower*, 2001 WL 1111231 (Ill. Ct. App. 2001) (holding that the Illinois motor fuel use tax is a tax and not a user fee). Accordingly, the Court is not persuaded by M.X. Express's "user fee" arguments.

M.X. Express also tries to use this Court's discussion of the policy for the MCFT in *Area Interstate Trucking*, 605 N.E.2d at 277, to show that the MCFT is a user fee. The issue whether the MCFT is a user fee was not reached in that case. Thus, M.X. Express mistakenly relies on Area Interstate Trucking and its progeny.

> and contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct benefit.

Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175, 199-200 (1995) (emphasis in original) (citations omitted, internal punctuation omitted), *reh'g denied*. Accordingly, this Court need only determine whether the taxpayer has a substantial nexus with Indiana, and whether "the measure of the tax . . . [is] reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of the state tax burden." *Commonwealth Edison*, 453 U.S. at 625-26 (emphasis in original) (internal punctuation omitted). The parties do not dispute the fact that M.X. Express has a substantial nexus with Indiana,[4] leaving for resolution whether the measure of the MCFT is reasonably related to M.X. Express's contact with Indiana.

When a tax is assessed proportionally "to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of police and fire protection, the benefit of a trained work force, and the advantages of civilized society." *Commonwealth Edison*, 453 U.S. at 627 (internal quotation marks omitted); *see also State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 446 (1940) (upholding the taxing power of a state where the measure and incidence of an earnings tax on foreign corporations were tied to the earning opportunities afforded by the state), *reh'g denied*. For the purpose of the MCFT, Indiana taxes M.X. Express on fuel it consumes on

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[4] M.X. Express has a physical presence in Indiana, and Indiana is M.X. Express's base state for the collection of the MCFT under the IFTA.

Indiana highways as measured by the miles it drives on Indiana highways. I.C. § 6-6-4.1-4(a). Thus, the measure of the MCFT is in "proper proportion" to the extent of M.X. Express's activity on Indiana highways and, therefore, to its "consequent enjoyment of the opportunities and protections which the State has afforded in connection with those activities." *Commonwealth Edison*, 453 U.S. at 626 (internal quotation marks omitted); *see also Area Interstate Trucking*, 605 N.E.2d at 278 n.11.

By assessing the MCFT for the fuel that M.X. Express consumes on Indiana highways, the State is merely requiring M.X. Express to assume its fair share of the State tax burden. *Commonwealth Edison*, 453 U.S. at 627, 629; *Complete Auto*, 430 U.S. at 279. The State is well within its rights – and well within the Commerce Clause – to do so. Accordingly, the Court holds that the MCFT does not violate the Commerce Clause under the fourth prong of the *Complete Auto* test.[5]

CONCLUSION

For the forgoing reasons, the Court DENIES M.X. Express's request for class certification and DENIES its partial motion for summary judgment. The Court GRANTS summary judgment to the Department.

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[5] It should be noted that "[i]n the absence of a violation of . . . substantial nexus, fair apportionment, and nondiscrimination[,] courts are not equipped to determine the appropriate portion of a state's tax burden that ought to be borne by any segment of the state's industry." JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, I STATE TAXATION, ¶4.17[e] (3d ed. 2001).

IN THE
INDIANA TAX COURT
CASE NO. 49T10-0002-TA-13

MAX E. ANDERSON, d.b.a. M.X. EXPRESS, Petitioner,	)	
v.	)	(Filed Oct. 30, 2001)
INDIANA DEPARTMENT OF STATE REVENUE, Respondent.	)	

JUDGMENT ENTRY PURSUANT TO IND. TRIAL RULE 58

The Petitioner, Max Anderson, d.b.a. M.X. Express (M.X. Express), by counsel, and the Respondent, the Indiana Department of State Revenue (Department) by counsel, appeared before the Court. For the reasons stated in the opinion issued on this date, the Court now DENIES M.X. Express's Motion for Class Certification and DENIES its Motion for Partial Summary Judgment. The Court GRANTS summary judgment to the Department. The parties shall bear their own costs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be and is entered in favor of the Department and against M.X. Express.

SO ORDERED this 30th day of October, 2001.

/s/ Thomas G. Fisher
Thomas G. Fisher, Judge
Indiana Tax Court

Distribution:

IN THE
INDIANA TAX COURT
CASE NO. 49T10-0002-TA-13

MAX E. ANDERSON, d.b.a. M.X. EXPRESS, Individually and on behalf of all others similarly situated,	)
Petitioner	)
v.	)
STATE OF INDIANA, INDIANA DEPARTMENT OF STATE REVENUE,	)
Respondent.	)

ORDER

Comes Petitioner, by counsel, and files Petition for Rehearing and comes Respondent, by counsel, and files Brief in Opposition to Petition for Rehearing.

The Court, being advised, now OVERRULES AND DENIES Petitioner's Petition for Rehearing.

SO ORDERED this 18 day of December, 2000.

/s/ Thomas G. Fisher
Thomas G. Fisher, Judge
Indiana Tax Court

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SUPREME COURT, COURT OF APPEALS, AND TAX COURT

STATE OF INDIANA

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Cause Number
49T10-0002-TA-00013
Lower Court Number:
N/A

ANDERSON, MAX E. -V- INDIANA DEPARTMENT OF STATE REVENUE

You are hereby notified that the SUPREME COURT has on this day 5/08/02 PETITIONER'S PETITION FOR REVIEW IS HEREBY DENIED.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR. KM

WITNESS my name and the seal of said Court, this 8TH day of MAY, 2002

/s/ Brian Bishop
Clerk Supreme Court,
Court of Appeals and Tax Court

IC 6-6-4.1
Chapter 4.1. Motor Carrier Fuel Tax

* * *

IC 6-6-4.1-2
Sec. 2. (a) Except as provided in subsection (b), this chapter applies to each:

(1) passenger vehicle that has seats for more than nine (9) passengers in addition to the driver;

(2) road tractor;

(3) tractor truck;

(4) truck having more than two (2) axles;

(5) truck having a gross weight or a declared gross weight greater than twenty-six thousand (26,000) pounds; and

(6) vehicle used in combination if the gross weight or the declared gross weight of the combination is greater than twenty-six thousand (26,000) pounds; that is propelled by motor fuel.

* * *

IC 6-6-4.1-4
Sec. 4. (a) A tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana. The rate of this tax is the same rate per gallon as the rate per gallon at which special fuel is taxed under IC 6-6-2.5.

The tax shall be paid quarterly by the carrier to the department on or before the last day of the month immediately following the quarter.

(b) The amount of motor fuel consumed by a carrier in its operations on highways in Indiana is the total amount of motor fuel consumed in its entire operations within and without Indiana, multiplied by a fraction. The numerator of the fraction is the total number of miles traveled on highways in Indiana, and the denominator of the fraction is the total number of miles traveled within and without Indiana.

(c) The amount of tax that a carrier shall pay for a particular quarter under this section equals the product of the tax rate in effect for that quarter, multiplied by the amount of motor fuel consumed by the carrier in its operation on highways in Indiana and upon which the carrier has not paid tax imposed under IC 6-6-1.1 or IC 6-6-2.5.

(d) Subject to section 4.8 of this chapter, a carrier is entitled to a proportional use credit against the tax imposed under this section for that portion of motor fuel used to propel equipment mounted on a motor vehicle having a common reservoir for locomotion on the highway and the operation of the equipment, as determined by rule of the commissioner. An application for a proportional use credit under this subsection shall be filed on a quarterly basis on a form prescribed by the department.

IC 6-6-4.1-4.5

Sec. 4.5. (a) A surcharge tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana. The rate of this surcharge tax is eleven cents ($0.11) per gallon. The tax shall be paid quarterly by the carrier to the department on or before the last day of the month immediately following the quarter.

(b) The amount of motor fuel consumed by a carrier in its operations on highways in Indiana is the total amount of motor fuel consumed in its entire operations within and without Indiana, multiplied by a fraction. The numerator of the fraction is the total number of miles traveled on highways in Indiana, and the denominator of the fraction is the total number of miles traveled within and without Indiana.

(c) The amount of tax that a carrier shall pay for a particular quarter under this section equals the product of the tax rate in effect for that quarter, multiplied by the amount of motor fuel consumed by the carrier in its operation on highways in Indiana.

(d) Subject to section 4.8 of this chapter, a carrier is entitled to a proportional use credit against the tax imposed under this section for that portion of motor fuel used to propel equipment mounted on a motor vehicle having a common reservoir for locomotion on the highway and the operation of this equipment as determined by rule of the commissioner. An application for a proportional use credit under this subsection shall be filed on a quarterly basis on a form prescribed by the department.

* * *

IC 6-6-4.1-4.8

Sec. 4.8. (a) This section applies only to a claim for a proportional use credit under section 4(d) or 4.5(d) of this chapter for taxes first due and payable after July 31, 1999.

(b) In order to obtain a proportional use credit against taxes imposed under section 4 or 4.5 of this chapter, a carrier must file a claim with the department. The claim must be submitted on a form prescribed by the department and must be filed with the quarterly return for the taxable period for which the proportional use credit is claimed. A carrier is not entitled to a proportional use credit under section 4(d) or 4.5(d) of this chapter unless the carrier has paid in full the taxes to which the credit applies. A credit approved under this section shall, subject to this section, be refunded to the carrier without interest.

* * *

IC 6-6-4.1-5

Sec. 5. (a) The department shall deposit revenue collected under sections 4 and 12 of this chapter in the state highway fund (IC 8-23-9-54).

(b) The department shall deposit revenue collected under section 4.5 of this chapter as follows:

(1) Forty-five and one-half percent (45.5%) in the state highway fund (IC 8-23-9-54).

(2) Forty-five and one-half percent (45.5%) in the motor vehicle highway account (IC 8-14-1).

(3) Nine percent (9%) in the motor carrier regulation fund administered by the department.

(c) The department shall deposit revenue collected under section 13 of this chapter as follows:

(1) Thirty-five percent (35%) in the motor vehicle highway account (IC 8-14-1).

(2) Sixty-five percent (65%) in the state highway fund (IC 8-23-9-54).

IC 6-6-4.1-6

Sec. 6. (a) A carrier is entitled to a credit against the tax imposed under section 4 of this chapter if the carrier, or a lessor operating under the carrier's annual permit, has:

(1) paid the tax imposed under IC 6-6-1.1 or IC 6-6-2.5 on motor fuel purchased in Indiana;

(2) consumed the motor fuel outside Indiana; and

(3) paid a gasoline, special fuel, or road tax with respect to the fuel in one (1) or more other states or jurisdictions.

(b) The amount of credit for a quarter is equal to the tax paid under IC 6-6-1.1 and IC 6-6-2.5 on motor fuel that:

(1) was purchased in Indiana;

(2) was consumed outside Indiana; and

(3) with respect to which the carrier paid a gasoline, special fuel, or road tax to another state or jurisdiction.

(c) To qualify for the credit, the carrier shall submit any evidence required by the department of payment of the tax imposed under IC 6-6-1.1 or IC 6-6-2.5.

(d) A credit earned by a carrier in a particular quarter shall be applied against the carrier's tax liability under this chapter for that quarter before any credit carryover is applied against that liability under section 7 of this chapter.

IN THE
INDIANA TAX COURT
CASE NUMBER 49T-0002-TA-13

MAX E. ANDERSON, d.b.a. M.X. EXPRESS, Individually and on behalf of all others similarly situated,	)	
Petitioner	)	
v.	)	(Filed Feb. 2, 2000)
STATE OF INDIANA, INDIANA DEPARTMENT OF STATE REVENUE;	)	
Respondent.	)	

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

Max E. Anderson, d.b.a. M.X. Express ("Petitioner/Plaintiff" or "class representative" or "taxpayer"), by counsel, bring this action, on behalf of himself and all others similarly situated, against the State of Indiana, Indiana Department of State Revenue ("Respondent/Defendant") and allege as follows:

NATURE OF THE ACTION

1. This is a class action pursuant to which Plaintiff, as class representative on behalf of himself and all others similarly situated, challenge the constitutionality of Indiana Code ("IC") §§ 6-6-4.1-4, 6-6-4.1-4.5, which requires the collection of a Motor Carrier Fuel Tax ("MCFT") on commercial vehicles based on their miles driven on the

Indiana East – West Toll Road (the "Toll Road") as repugnant to Article 1, Section 8, Clause 3 of the United States Constitution (the"Commerce Clause").[1]

JURISDICTION

2. The Plaintiff, Max E. Anderson, filed a claim for refund with the Indiana Department of Revenue for the MCFT imposed on commercial vehicles for their miles driven on the Toll Road on the grounds that this imposition of the fuel tax constituted an undue burden on interstate commerce in violation of the Commerce Clause. Exhibit A. That claim was denied on November 10, 1999. Exhibit B. The basis for the denial was that the claim was

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[1] In *Area Interstate Trucking, Inc. v. Indiana Dept of Revenue*, 605 N.E. 2d 272 (Ind. Tax 1992), this Court found that the MCFT did not violate the due process and equal protection clauses of the 14th Amendment of the U.S. Constitution. Since this action challenges the same tax based on a violation of the Commerce Clause, it is not governed by that decision.

The identical issue was raised in *Owner-Operator Independent Drivers Association v. Indiana*, 49DO69902Cp000250, filed February 19, 1999, in a court of general jurisdiction. Plaintiffs in that action are represented by the same counsel representing Plaintiff in this action. The plaintiffs in that action all paid their Indiana tax obligations to jurisdictions other than the State of Indiana. Therefore, they did not have administrative remedies before the Department of State Revenue. Thus, they could not seek a denial of a claim that would form the basis of this Court's jurisdiction. However, based on decisions in cases such as *Lake County Council v. State Bd. of Tax Commissioners*, 706 N.E.2d 270 (Ind. Tax 1999), the law on this issue is developing. The Defendant filed a motion to dismiss arguing that the Plaintiffs failed to exhaust unspecified administrative remedies. The Marion County Circuit Court granted Defendants' motion to dismiss for lack of subject matter jurisdiction and dismissed the Complaint without prejudice on June 10, 1999. That decision is currently on appeal.

"[p]rohibited by statute." The explanation for the denial stated in full is:

> The licensee request for refund is denied. No adjustment was allowed for exempt miles. The Indiana Toll Road is a highway and is therefore not exempt from the Indiana Motor Fuel Taxes. IC 6-6-4.1-4(a)

3. Pursuant to IC § 33-3-5-2, the Indiana Tax Court "has exclusive jurisdiction over any case that arises under the tax laws of this state and that is an initial appeal of a final determination made by . . . the department of state revenue with respect to a listed tax." Since this action involves a case arising under the tax laws of Indiana and is an initial appeal of a final determination made by the Department of State Revenue, this court has jurisdiction over this matter.

PARTIES TO THE ACTION

Plaintiffs

4. Max E. Anderson operates M.X. Express, an Indiana motor carrier with operating authority granted by the U.S. Department of Transportation. As a taxpayer, Mr Andersen is representative of all taxpayers who have paid the Indiana MCFT. These taxpayers pay the MCFT in two different ways. Taxpayers, such a Mr. Anderson who are registered as Indiana motor carriers pay their taxes directly to the State of Indiana. Nonresident taxpayers who are registered in other states or the provinces of Canada pay their Indiana fuel tax obligations to those other jurisdictions, who in turn pass on those taxes to Indiana.

5. Each of the other states and the provinces of Canada have entered into a reciprocal agreement with the state of Indiana under the International Fuel Tax Agreement ("IFTA") as described in ¶ 6 below. Taxpayers registered with those states have filed no tax returns directly with the State of Indiana. The administrative requirements of IC § 6-6-4.1, including the requirement to exhaust administrative remedies, have been waived by the State of Indiana pursuant to IC § 6-6-4.1-14(a). Nonresident taxpayers are exempt "from any of the requirements that would otherwise be imposed by" Chapter 4.1 of Title 6, Article 6 of the Indiana Code pursuant to IC § 6-6-4.1-14(b).

6. The Intermodal Surface Transportation Efficiency Act of 1991 required that all states become members of the International Fuel Tax Agreement ("IFTA") by September 30, 1996. 49 U.S.C. § 31705. Indiana has been a member of IFTA since 1990. Under IFTA, owner-operators and motor carriers pay all of their state MCFT obligations to the state or Canadian province in which they are registered (the "Base State") rather than making multiple payments to the different states or provinces in which they operate (the "Taxing States"). The Base State to which the taxpayer's total fuel tax payment is made transfers the appropriate funds to the state where the fuel tax liability was incurred, the Taxing State. As a Taxing State, the State of Indiana receives and maintains IFTA fuel tax returns only for taxpayers for whom Indiana acts as a Base State. Taxpayers based in other states file their IFTA fuel tax returns in their individual Base States.

7. Many of the potential class members are individuals who own and operate their own vehicles. These

individuals are know [sic] as "owner-operators." Owner-operators are typically small business men and women who own and operate Class 7 and 8 trucks (large tractor-trailers) in interstate commerce. Owner-operators typically lease their equipment, with drivers, to private carriers and/or regulated motor carriers operating under the authority granted by the U.S. Department of Transportation ("DOT") and formerly by the Interstate Commerce Commission ("ICC"). Owner-operators who lease their trucks and services to regulated motor carriers are, together with the regulated motor carrier, jointly and severally liable for the payment of the Indiana MCFT. IC § 6-6-4.1-3(e).

8. The overwhelming majority of regulated motor carriers who file tax returns on account of fuel consumed within Indiana by owner-operators under lease to them pass such tax obligations back to owner-operators pursuant to the terms of the lease agreements executed between the regulated carriers and their owner-operators. Owner-operators thus bear the burden of Indiana's MCFT even when these taxes are paid directly by a regulated motor carrier.

Defendant

9. Defendant State of Indiana, Indiana Department of State Revenue, is responsible for collecting the MCFT under IC §§ 6-6-4.1-4, 6-6-4.1-4.5. The MCFT is the subject of this litigation.

CLASS ACTION ALLEGATIONS

10. ***Class Description***. Pursuant to Trial Rule ("TR") 23 of the Indiana Rules of Trial Procedure, named Plaintiff brings this action on behalf of persons who pay the Indiana MCFT and who have been harmed by Indiana's practice of collecting fuel tax based on miles driven on the Indiana Toll Road. This class includes taxpayers who pay the fuel tax directly to the State of Indiana as well as taxpayers who are based in states other than Indiana or are based in one of the Canadian provinces and who pay their Indiana fuel tax obligations to their base jurisdictions.

11. ***No Administrative Remedies to Exhaust***. There are no administrative remedies for absent class members to exhaust as a precondition to joining the class for which certification is sought by the Plaintiff. The Department of Revenue did not address the merits of the Plaintiff's constitutional claim. The Department of Revenue determined that the claim must be denied because there was no statutory exemption to the imposition of the MCFT for miles driven on the Toll Road without regard to whether the imposition of the MCFT for Toll Road miles is unconstitutional as claimed by the Plaintiff herein. The Department of Revenue's determination not to address the merits of Plaintiff's constitutional claim establishes that there is no administrative remedy available for resolution of that constitutional claim. The claims of all absent class members are identical to the claim of the named Plaintiff. This case may therefore proceed as a class action on behalf of all motor carriers and owner operators who have paid the MCFT for use of the Indiana Toll Road.

12. ***Impracticability of Joinder***. Upon information and belief, there are hundreds of thousands of motor carriers and owner-operators who have paid MCFT based on miles driven on the Indiana Toll Road. All such persons are potential class members. Individual joinder of all potential class members is thus impracticable.

13. ***Commonality***. IC §§ 6-6-4.1-4, 6-6-4.1-4.5 affects all potential class members similarly. Accordingly, any questions of fact are common to the potential class as a whole. The application of IC §§ 6-6-4.1-4, 6-6-4.1-4.5 has also caused the same harm to potential class members. Accordingly, questions of Indiana's liability to the class are common to all class members. Additionally, Indiana has acted in the same manner with respect to each member of the class. Therefore, class-wide injunctive relief against such conduct is also appropriate.

14. ***Typicality***. The claims of the Plaintiffs are typical of the claims of the potential class as a whole.

15. ***Fair and Adequate Representation***. Plaintiffs are capable of fairly and adequately protecting the interests of the potential class.

16. ***Class Action Appropriate Under TR 23(B)(2)***. Indiana's practice of collecting fuel tax on miles driven on the Indiana Toll Road affects the potential class as a whole. Thus injunctive and declaratory relief is appropriate with respect to the potential class as a whole, making class certification appropriate under TR 23(B)(2).

17. ***Class Action Appropriate Under TR 23(B)(3)***. The questions of law, enumerated in the counts below, are common to all potential class members, and predominate over any questions affecting only individual

members, thereby making a class action superior to other available methods for the fair and efficient adjudication of the claims herein.

18. ***Other Factors.*** Other factors favoring the maintenance of this suit as a class action include:

(a) the amounts in controversy for individual plaintiffs are relatively small so that individual members of the potential class would not find it cost-effective to bring individual claims;

(b) requiring individuals to prosecute separate actions would substantially impair or impede the individual members' ability to protect their interests;

(c) it is desirable to concentrate the individual members' claims in one forum, because, given the amount in controversy, to require these claims to be brought in separate forums would effectively prevent individuals from bringing claims to recover their damages;

(d) no substantial difficulties are likely to be encountered in managing this class action; and

(e) counsel in this matter are experienced in both the trucking industry and in the management of class action litigation.

COUNT ONE

19. The Indiana Toll Road traverses the State of Indiana from East to West. It is a link in the interstate highway transportation network connecting the Ohio Turnpike with the toll roads of Illinois and is heavily used by Plaintiffs and members of the class whom they represent. Over 60 percent of the toll revenues collected by the

Indiana Transportation Finance Authority ("The Authority") are derived from commercial vehicles.

20. The Authority is a body both corporate and politic in the State of Indiana charged by law with operating the Toll Road. The Authority receives no funds from the State of Indiana for operating or maintaining the Toll Road. The entire cost of operating the Toll Road, including all administrative, maintenance and capital costs, as well as the cost of traffic control, safety, and policing functions, are paid for through tolls, restaurant and service station concessions, and similar earnings. The Toll Road reported a net income after all expenses of $20,151,901 and $26,754,077 respectively for fiscal years 1996 and 1997. The Authority is solely responsible for its finances and the credit of the State of Indiana is not pledged to the operation of the Toll Road. "[A]ny indebtedness incurred by the Authority does not constitute an indebtedness of the State within the meaning or application of any constitutional provision or limitation." *Financial Statements of the Indiana Transportation Finance Authority – East – West Toll Road* at 5 ("*Financial Statements*"); *see also* IC § 8-15-2-2.

21. IC §§ 6-6-4.1-4, 6-6-4.1-4.5 requires the payment of a MCFT by a person operating a commercial motor vehicle on the highways of Indiana. For the purposes of these provisions, the Indiana Toll Road is an Indiana highway.

22. Upon information and belief, the fuel tax imposed by IC §§ 6-6-4.1-4, 6-6-4.1-4.5 currently equals 27 cents per gallon.

23. IC § 6-6-4.1-5 specifies the highway-related accounts into which the fuel tax shall be placed. Those accounts do not include accounts that fund the Toll Road.

24. The fuel tax imposed by Indiana is assessed on the fuel consumed in Indiana. Sixteen cents of the fuel tax is included in the price of the fuel and collected at the pump on fuel purchased in Indiana. An additional eleven cents is collected at the time the taxpayer files its quarterly fuel-tax report. In addition, if any of the fuel consumed in Indiana was purchased in another state, the taxpayer is required to pay sixteen cents based on the miles driven in Indiana divided by the taxpayer's average fuel consumption. Taxpayers file quarterly tax returns with their individual Base States under IFTA pursuant to regulations and procedures established by Defendant International Fuel Tax Association, Inc.

25. Upon information and belief, Plaintiffs allege that Indiana collected approximately $18 million in MCFT revenue based on mileage driven by commercial vehicles on the Indiana Toll Road during fiscal year 1997. Upon information and belief, Plaintiffs estimate that Indiana collected similar amounts of MCFT on the basis of miles driven by commercial vehicles subject to IC §§ 6-6-4.1-4, 6-6-4.1-4.5 during the years 1996, 1998 and 1999.

26. IC § 6-6-4.1-7 sets forth a statute of limitations for claims for refunds of the MCFT. The application for refund must be submitted within three years after the end of the calendar year that contains the taxable period in which the tax or penalty was erroneously paid.

27. The Department of Revenue's collection of the MCFT for the use of commercial vehicles on the Toll Road is not fairly related to any services provided by the State

of Indiana in connection with interstate travel over the Toll Road in that: (a) the State of Indiana itself provides no services in connection with the operation of the Toll Road; and (b) such services as are provided to commercial vehicles by the Authority are fully paid for through the collection of tolls and other revenues no part of which comes from the State of Indiana. Accordingly, the collection of fuel tax on the basis of miles driven by commercial vehicles on the Toll Road is an undue burden on interstate commerce in violation of the rights secured to Plaintiffs and to all members of the Plaintiff class under Article 1, § 8, Clause 3 of the U.S. Constitution, the Commerce Clause.

28. By virtue of the matters herein alleged, a present and actual controversy exists between Plaintiffs and Defendants that is ripe for adjudication by this Court. Plaintiffs are without an adequate remedy at law for the substantial and irreparable injury they have suffered and with which they are threatened in the future and require equitable relief to protect and preserve their rights.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiff, Max E. Anderson on behalf [sic] himself, and all others similarly situated, respectfully request that this Court:

(1) Declare that part of IC §§ 6-6-4.1-4, 6-6-4.1-4.5 requiring commercial vehicles to pay MCFT on miles driven on the Indiana Toll Road to be unconstitutional and void;

(2) Order that the State of Indiana refund to Plaintiff and members of the Plaintiff class any MCFT paid by

commercial motor vehicles on miles driven on the Indiana Toll Road for all periods of its illegal collection, plus interest;

(3) Enjoin Defendant, State of Indiana, Indiana Department of State Revenue, from collecting fuel tax on miles driven on the Indiana Toll Road by commercial motor vehicles;

(4) Certify a class comprised of motor carriers and owner-operators who are subject to IC §§ 6-6-4.1-4, 6-6-4.1-4.5 and have paid MCFT based on miles driven on the Indiana Toll Road;

(5) Create a common fund made up of all damages owed by the State of Indiana to individual class members;

(6) Award class counsel a sum for reasonable attorneys' fees and expenses incurred in the prosecution of this action to be paid out of the common fund; and

(7) Award such other relief as this Court may deem to be just and proper.

Respectfully submitted,

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